

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

KOHLER CO.

and

Case 26–CA–22733

KEVIN BREWER, an Individual

and

Case 26–CA–22750

JOHN CLIFTON, an Individual

and

Case 26–CA–22744

JAMES SKINNER, an Individual

Linda M. Mohns, Esq., for the General Counsel.

Jack G. Pawley and Kevin J. Kinney, Esqs.,
for the Respondent.

Mr. Kevin Brewer, Mr. John Clifton, and
Mr. James Skinner, the Charging Parties.

DECISION

Statement of the Case

GEORGE CARSON II, Administrative Law Judge. These cases were heard in Searcy, Arkansas, on February 4, 2008, and April 8, 2008, pursuant to a second amended consolidated complaint that issued on January 11, 2008.¹ On February 4, 2008, prior to hearing any testimony, I granted a joint motion for postponement so that Kohler Co. and International Union, United Automobile, Aerospace & Agricultural Implement Workers of America–UAW, could pursue the resolution of various issues. On March 10, 2008, I was advised that the Company and Union had agreed upon a collective-bargaining agreement, that the Union’s strike that had lasted for over a year had ended, and that the parties had settled the complaint allegations predicated upon multiple charges that had been filed by the Union. On March 17, 2008, I approved an informal settlement agreement relating to those complaint allegations and severed Cases Nos. 26–CA–22792, 26–CA–22812, 26–CA–22833, and 26–CA–22919 from Cases Nos. 26–CA–22733, 26–CA–22744, and 26–CA–22750.

The remaining cases, individually filed by the three Charging Parties named above, were tried on April 8, 2008. When the hearing convened on April 8, I granted the motion of Counsel for the General Counsel to withdraw the substantive allegations encompassed by the settlement agreement. The remaining complaint paragraphs, 14(b), (d), and (f), 17, and 18,

¹ All dates are in 2007 unless otherwise indicated. The charge in Case No. 26–CA–22733 was filed on April 17 and was amended on June 7 and October 22, the charge in Case No. 26–CA–22744 was filed on May 1, and the charge in Case No. 26–CA–22750 was filed on May 11.

allege that the Respondent stated to unit employees that they were required to complete new applications in order to return to work and implied that contractual job protections and other benefits would not exist when they returned to work in violation of Section 8(a)(1) of the National Labor Relations Act, and that the Respondent failed and refused to reinstate employees who had not been allowed to work during the strike in violation of Section 8(a)(1) and (3) of the Act. The Respondent's answer denies any violation of the Act. I find that the Respondent violated the Act substantially as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following²

Findings of Fact

I. Jurisdiction

The Respondent, Kohler Co., the Company, a Wisconsin corporation, is engaged in the manufacture of stainless steel sinks at its facility in Searcy, Arkansas. The Company annually purchases and receives at its Searcy, Arkansas, facility goods and materials valued in excess of \$50,000 directly from points located outside the State of Arkansas. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find and conclude, that International Union, United Automobile, Aerospace & Agricultural Implement Workers of America –UAW, and its Local 1000, herein jointly referred to as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Union had represented production and maintenance employees of the Company at Searcy, Arkansas, in the following appropriate unit since 1967:

Included: All production and maintenance employees employed at the Respondent's Searcy, Arkansas, facility

Excluded: All office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The most recent collective-bargaining agreement was effective by its terms from December 5, 2002, until December 5, 2006. The parties had not agreed upon the terms of a new collective-bargaining agreement when that contract expired. One point of disagreement was a Company proposed two-tiered wage structure under which new employees would be paid less than current employees performing the same job.

At the hearing, the parties submitted a stipulation to various facts including the following:

² The unopposed motion of the General Counsel to correct the transcript is granted and received into the record as General Counsel's Exhibit 20.

1. At 12:01 a.m. on December 9, 2006, UAW Local 1000 commenced a strike at Respondent's Searcy, Arkansas facility.

2. During the period from December 10, 2006, through February 15, 2007, no bargaining unit employees reported to work at the Searcy, Arkansas, facility.

3. During the period from December 10, 2006, through about February 14, 2007, Respondent did not hire any new employees to perform bargaining unit work at the Searcy, Arkansas, facility.

4. Beginning about February 13, 2007, Respondent began the process of hiring temporary replacement employees for the purpose of performing bargaining unit work. On March 6, 2007, said temporary replacements were first advised that their status had been changed to the status of permanent replacements.

The complaint, in paragraph 11, alleges that "[s]ince on or about December 9, 2006, *certain* employees of Respondent represented by the Union and employed at Respondent's Searcy, Arkansas, facility ceased work concertedly and engaged in a strike. (Emphasis added.) The Respondent's answer states: "Admit the allegation contained in paragraph 11, but affirmatively state that *all* bargaining unit employees employed by the Respondent at its Searcy, Arkansas, facility ceased work concertedly and engaged in a strike since on or about December 9, 2006." (Emphasis added.)

The strike ended in March 2008, pursuant to the negotiations that, as noted above, also resulted in agreement upon a new collective-bargaining agreement and settlement of the unfair labor practice charges filed by the Union.

This proceeding relates to the failure to reinstate the three individual Charging Parties, all of whom are in the unit but none of whom are members of the Union. Charging Party John Clifton was recalled on March 10, 2008, pursuant to the settlement.

B. Facts

During the period from December 19, 2006, until February 14, no unit employees worked. Supervisors and nonunit personnel filled orders from existing inventory. On Monday, February 12, the Company issued a press release, and on February 14, the substance of that press release was reported in an article in the Searcy daily newspaper, *The Daily Citizen*. The article, in pertinent part states:

In a press release titled, "Kohler Company hiring at Searcy Plant," dated Monday, the company announced it has begun recruiting new employees to fill skilled and unskilled positions at the plant. ... Individuals interested in applying for positions should call the factory at (501) 268-4483, officials said and leave their name and number. Applicants will be contacted by phone with further instructions. Kohler is not taking walk-in applications.

Mary Johnson, who is currently the Human Resources Manager for the Kitchen Product Team at the Company's headquarters in Kohler, Wisconsin, was at all times relevant to this proceeding the Human Resources Manager at the Searcy, Arkansas, facility. Johnson explained that, after the article appeared, the Company initially tried to return calls as they were received but, due to the large number of calls received, she "realized we were going to need to track this because there was a lot more phone calls coming in than we were making going out."

Therefore, on February 21, the Company created a data base, alphabetized by first name, that reflected the caller's name, telephone number, and any other information that the caller gave that appeared to be relevant. Anyone who called between February 14 and 21, before the data base was created, was included if the Company "still had their records," but Johnson acknowledged that everyone who called between February 14 and 21 was "not necessarily" placed into the data base.

Over the next several weeks, the data base was recopied and consolidated several times. On or about March 9, the Company began assigning tracking numbers to the names on the data base. Although there was an attempt to keep the same tracking number assigned to a specific applicant when the data base was updated, examination of the printouts of the data base list reveals that the attempt was unsuccessful.

Johnson's chief assistant regarding the application process was Senior Human Resources Assistant Amanda Stanisor, alleged in the complaint and admitted in the answer to be an agent of the Company. Due to the large number of applicants, Cathy Hartsell, the plant accountant, and Marilyn Hummer, an administrative clerical support person, also assisted.

Plant Manager Jerry Stone explained that the Company decided to hire replacement employees in order to assure that its customers would be served. Management determined the wages that would be offered. Employees in the general labor classification would be paid \$13.25 an hour, with a \$1 an hour raise after 30 days. Notwithstanding the fact that the Company's final offer had proposed a two tiered wage system, the Tier I wages that were to apply to current employees were not offered to returning employees. Rather, returning employees in the general labor classifications were offered the Tier II wage, but with the 30 day waiting period waived. Thus they would be hired at \$14.25 per hour. Stone acknowledged that at least one returning employee "slipped through the cracks" and was only paid \$13.25 an hour for 30 days. When asked whether the Company was treating a returning employee "as an experienced new employee," Stone answered, "They were an experienced employee, yes." Stone admitted that no returning employee was paid at the Tier 1 rate.³

No witness for the Company testified to any application procedure that distinguished employees seeking to return to work from new applicants. Employees seeking to return called the same telephone number as new applicants, and their names were placed into the data base alongside new applicants. Johnson acknowledged that all who called seeking employment were advised that they would have to fill out an application, have an interview, pass a drug test, and go through new employee orientation. Johnson noted that employees seeking to return were given their former applications and claimed that the application requirement was to "make sure that we had current or updated information." I do not credit that testimony. If that were the purpose, there would be no reason to require the employee to complete pages 2, 3, and 4 of the application relating to prior employment history, references, and language skills and certifications. The Company wanted a new application. Interviews of employees, as opposed to new applicants, were, according to Johnson, to determine whether the employee had any skills of which the Company was unaware. Whether that be true is immaterial. Another purpose of the interview was to inform the employee seeking to return that he or she was going to be paid at the same rate as new employees, albeit with the 30 day waiting period waived.

It is undisputed that Charging Party Kevin Brewer's name does not appear on the data base list. Brewer, contrary to the instruction in the newspaper article, went to the plant. General

³ The wage rate for certain highly skilled positions was the same for Tier I and Tier II.

Counsel's Exhibit 12 (GC Exh. 12) reflects the various incarnations of the data base.⁴ Charging Party James Skinner's name appears four times: on the "ORIGINAL," GC Exh. 12, Tab A, page 3, with the notation "kohler [sic] associate; on the "PULLED OF [sic] PHONE 022407 [presumably 2/24/07]," GC Exh. 12, Tab E, page 2, with the notation "Kohler associate;" on the "CALL LIST 3_07," GC Exh. 12, Tab F, page 3, with the notation "current employee;" and on the "NEXT CALL LIST," GC Exh. 12, Tab J, page 2, with the notation "Kohler associate." Charging Party John Clifton's name appears twice, both times on the "NEXT CALL LIST," GC Exh. 12, Tab J, first on page 6, about three quarters of the way down the page with the notations "prior employee" and "Not interested-6/1 records show not a good associate," and again at page 14, about three quarters of the way down the page with the notation "duplicate from 186, wanted to keep." The reference to 186 is in error; Clifton, at page 6, was assigned the number 182.

Kevin Brewer began working for the Company through a temporary agency. He became a full time employee on September 23, 2006. He was in training to be a packer. Shortly before the strike began, his supervisor, Terry Bunch, informed him that he would be awarded that position, but the strike occurred before he assumed it. At time of the strike, Brewer was unassigned and was placed on various jobs. His base pay was \$13.37 plus a shift differential of 10 cents for a total of \$13.47 per hour. For the three weeks immediately preceding the strike, his rate of pay was higher because of the jobs he was performing and varied from a low of \$13.52 to a high of \$13.65 per hour. The proposed Tier I rate for a packer was \$15.75 an hour. On the first day that he was scheduled to work after the strike began, the morning of December 11, 2006, Brewer went to the plant but was denied access. He called Human Resources Manager Johnson who informed him that there was not enough work for the "12 to 15 nonunion members," that he should apply for unemployment benefits. He did so but was denied. In early February, Brewer called the Human Resources office at Company headquarters in Wisconsin. The female employee with whom he spoke told him that the Company "had me out on special leave just like everyone else on the strike and that I had to take it up with the Searcy plant."

On February 14, a friend who was on strike informed Brewer of the article in *The Daily Citizen*. Brewer called the number and was informed that he should call later and get an appointment. Brewer called *The Daily Citizen*, explained that he was aware that the Company had started hiring, that he was not a member of the Union, and "expected some problems" when he went to apply for work. The reporter with whom he spoke told him to go ahead and then call him back.

Brewer went to the plant. A security guard called into the plant and then permitted Brewer to enter. As he was walking up the hall to the Human Resources office, he was met by Amanda Stanisor who had some papers in her hand. He asked why he was not working, why he was not called. Stanisor explained that "if we call one person, we have to call all." She explained that he had to fill out an application. Brewer asked why he had to fill out another application "when I'm already employed." Stanisor answered that "this is just the way we have to do this." Stanisor handed the papers she was carrying to Brewer. One was his original application; the other was a blank application. He filled out the blank application, but placed the date of his original application, September 18, 2006, on the new application. Having observed that Human Resources Manager Johnson was alone in her office, he went to speak with her. She asked if he was "interested in returning" to work, and Brewer answered, "[Y]es." He asked Johnson the same questions he had asked Stanisor, why he was not working and had not been

⁴ GC Exh. 13 is the computer disk containing the various versions of the data base, which prints out as the spread sheets that comprise GC Exh. 12.

called and why he had to fill out an application. Johnson gave the same answers, that if the Company called one person they had to call all and "this is just the way we have to do this."

5

Brewer was given a sheet that was given to all applicants which reflected that general production employees would be paid \$13.25 an hour with a \$1 an hour raise after 30 days. He and Johnson spoke of pay, and she informed Brewer that his rate would be the \$13.25 with the raise after 30 days. Brewer protested, asking why he would be paid less than he was making when the strike began. Johnson answered that this was "the way we have to do it." Brewer, who was aware that a legal proceeding in which he was involved would require his attendance in court for one day in the near future, expressed concern that he did not want to lose his job for missing a day shortly after resuming work. Johnson replied that the Company was working upon a handbook, and that the manner in which his anticipated absence was handled would be "up to the supervisor." Brewer stated that he wanted to talk the situation over with his wife. Johnson informed him that if he was going to come back to work he should report to orientation on Friday, to call and let her know.

10

15

Brewer spoke with his wife and decided that it would not be in his best interest to return because he would "have to start all back over" and had no assurance that he would not lose his job for missing work the day he had to be in court. He explained that if "you miss a day, you get written up ... [o]ne day don't determine your job." He thought that "the strike could be over any day and then I could go back with my job." He called Johnson several times, but only the answering machine responded. Finally he left a message, stating, "At this time, Mary, I didn't think it would be in my best interest to come back to work." Brewer did not call the newspaper reporter, but in the late afternoon on February 14, the reporter called him. Brewer spoke with him. The article, which appeared on February 15, related that Brewer had to fill out a new application but incorrectly reports Brewer's wage rate before the strike as \$13.25 per hour.

20

25

30

35

Johnson acknowledged that Brewer received the sheet reflecting the wage rate of \$13.25 per hour. She stated that Brewer would be making \$14.25 an hour because he had worked there previously and, therefore, the 30 day waiting period would not apply. When questioned whether that was what she had actually told Brewer, Johnson answered that "it was 14 or so months ago, I think. I can't attest to the exact statement that I made." Johnson acknowledged that she "should have told him \$14.25" and then said that she did so because "[t]hat's what we had indicated to anybody else that had come in." I do not credit that testimony. Brewer was clear that he was offered only \$13.25 and that he protested, but to no avail.

40

45

Johnson stated that she did inform Brewer that there would be no waiting period for benefits, such as insurance. She stated that Brewer inquired whether he would be returning to his former job and that she informed him that "it would make sense if the need was there," but that his job assignment was "up to manufacturing management." Johnson did not deny that she informed Brewer that the Company was working on a handbook and that the effect of his anticipated absence for his appearance in court would be "up to the supervisor."

Johnson testified that Brewer returned on Thursday, February 15, and spoke with her again. Whether he did so is immaterial in view of her vague testimony that she did not recall "anything specific that was different than maybe things that we had covered the day before." Brewer did not attend the orientation meeting on Friday. Johnson testified that Stanisor reported to her that Brewer left a voice message that morning stating that he would not be returning, that "he wanted to wait until the strike issues were resolved." Whether Brewer left the message that he would not be returning on Wednesday afternoon or Friday morning is immaterial. Stanisor did not testify, and I do not credit the hearsay report that Brewer stated that he wanted "to wait until the strike issues were resolved." I credit Brewer's testimony that he said that he "didn't

think it would be in my best interest to come back to work.” Brewer filed the charge herein on April 17.

5

John Clifton began working for the Company in 1994, and at the time of the strike was a pack operator on first shift. On December 11, Clifton went to the plant to report to work but observed that picketers were present and that the gate was locked. He returned home and called the Company, but got only a busy signal. Later that week, he sought to apply for unemployment compensation, but his application was denied. In February, he heard that the Company was hiring, and he bought the February 14 edition of *The Daily Citizen*. He did not call at that time because he “assumed they was going to call me back since they were hiring people.” He received no call. On March 2, Clifton called the number given in the newspaper article. Amanda Stanisor answered the telephone. He told her that he “wanted to come back to work.” Stanisor informed him that “they weren’t hiring at that time.” Clifton asked if he was fired, and Stanisor answered that he was not, that he would have to fill out an application to come back to work, “that was Company policy.” She stated that she would let Plant Manager Jerry Stone know he had called and would “call me back with they started hiring.” Clifton heard nothing and called the Human Resources telephone number on March 9 and 16. His call was answered by a machine. In both instances he left his name and number and stated that he wanted to “come back to work.” He filed the charge herein on May 11.

At some point prior to May 11, Clifton filed a complaint with the Equal Employment Opportunity Commission, EEOC, alleging that he had not been recalled because of his race. The Company responded to that complaint on May 7. The response contains several statements relevant to this proceeding, including the acknowledgement that “Mr. Clifton ... did apply when Ms. Stanisor *placed his name on the list* [emphasis added]” and the explanation that he has “not been allowed to ‘return to work’” because he did not call until March 2 and “there are now over 180 people ahead of him on the list of people that have expressed an interest in employment at the Searcy facility.”

Human Resources Director Johnson recalled that Stanisor informed her that Clifton had called inquiring about “the process of returning to work” but, according to Stanisor’s report, Clifton never specifically stated that he wanted to return. Regardless of the report that Stanisor made, Johnson admitted that “we assumed that that [a desire to return to work] was the intent of his call.” Thus, his name was placed on the list in the data base. Stanisor did not testify, thus Johnson’s testimony of what Clifton purportedly said to Stanisor is hearsay. I credit Clifton’s testimony that he told Stanisor that he “wanted to come back to work.”

On July 17, when stating the position of the Company regarding the charge filed by Clifton, the Company, consistent with the notation next to Clifton’s name on the data base list, contended that Clifton’s work performance had been “unfavorable and below expectations ... [t]herefore he did not merit further consideration for a replacement position.” The parties stipulated that the most recent discipline in Clifton’s file was a warning for failing to follow instructions issued on March 6, 2006. The Company presented no witness relating to Clifton’s alleged deficient performance. He was recalled on March 10, 2008, pursuant to the settlement.

James Skinner began working for the Company on August 5, 1996, and was a maintenance employee on third shift. On the first day that he was to report to work after the strike began, he went to the plant. He was told by a picketing employee that the Company had sent an e-mail telling nonmembers of the Union to go to the unemployment office. On February 23, a fellow employee informed him that he had called the Company, gone in and filled out an application, and been rehired. The friend brought him the newspaper that contained the article regarding rehiring. Skinner called the number that appeared in the article in the newspaper. His

call was answered by an answering machine and, pursuant to the instructions, he left his name and telephone number. The friend suggested that he also call Human Resources, and he gave Skinner a telephone number which was different from the number given in the newspaper article. Skinner called and was connected to an answering machine. He left his name and telephone number, and stated that he wanted a job interview. He heard nothing further. He filed the charge herein on May 1.

C. Analysis and Concluding Findings

1. The Failures to Reinstate

The complaint, in paragraph 17, alleges that the three Charging Parties “who were not allowed to work at Respondent’s facility during the strike ... made individual unconditional offers to return to their former or substantially equivalent positions of employment” and, in paragraph 18 alleges that the “Respondent has failed and refused to offer to reinstate the ... [three Charging Parties] to their former or substantially equivalent positions of employment.”

The parties stipulated that “[d]uring the period from December 10, 2006, through February 15, 2007, no bargaining unit employees reported to work at the Searcy, Arkansas, facility.” (Stipulation 2.) Brewer, Clifton, and Skinner each went to the plant and discovered that no unit employees were being permitted to enter. This Respondent, like the employer in *Amoco Oil Co.*, 285 NLRB 918 (1987), closed the gates and, as the brief of the General Counsel notes, effectively locked out employees who otherwise would have worked. Unlike the employer in *Amoco*, the Respondent herein did not contend that its action was to assure no violence or hostility between striking employees and employees who otherwise would not have struck. *Id.* at fn. 4. The Respondent herein admits in its answer that it considered “all bargaining unit employees ... [to have] ceased work concertedly and engaged in a strike.” (Emphasis added.) In view of the foregoing admission and the absence of any complaint allegation relating to the lawfulness of the lockout, I need make no finding regarding the Respondent’s actions prior to February 14.

Board precedent, since the decision in *Laidlaw Corp.*, 171 NLRB 1366 (1978), establishes that economic strikers who have not been permanently replaced are entitled to reinstatement upon their unconditional offers to return to work. When the Respondent unlocked the gates, the three Charging Parties, as hereinafter discussed, sought to return to work.

The Respondent, in its brief, argues that *Laidlaw* is not applicable because the three Charging Parties were not on strike. That argument has no merit. The complaint, at paragraph 11, alleges that “[s]ince on or about December 9, 2006, *certain* employees of Respondent represented by the Union ... ceased work concertedly and engaged in a strike. (Emphasis added.) The Respondent’s answer, which is not cited in its brief, states: “Admit the allegation contained in paragraph 11, but affirmatively state that *all* bargaining unit employees employed by the Respondent at its Searcy, Arkansas, facility ceased work concertedly and engaged in a strike since on or about December 9, 2006.” (Emphasis added.) The Respondent considered “all bargaining unit employees,” which included the three Charging Parties, to be on strike.

It is immaterial whether particular employees actually “engaged in any union or strike-related activity” insofar as the Company “believed that these employees were strikers.” *Marchese Metal Industries*, 313 NLRB 1022, 1028 (1994). Although the three Charging Parties were not members of the Union, they are in the bargaining unit and, insofar as the Respondent was concerned, “all bargaining unit employees” were on strike.

Precedent establishes that the use of the word “unconditional” is unnecessary when making an offer to return to work. Statements that the employee “would like to return to work” insofar as no conditions are attached, constitute unconditional offers to return to work. *Diamond Walnut Growers, Inc.*, 340 NLRB 1129 (2003).

The Respondent cites *Rapid Armored Truck Corp.*, 281 NLRB 371 (1986), and erroneously states that the Board affirmed the findings of the administrative law judge that various employee inquiries regarding returning to work in that case did not constitute unconditional offers to return. The Board never reached that issue. It affirmed the primary finding of the judge that the strike in which the employees engaged was unprotected, thus, the strikers were not entitled to reinstatement even assuming that they made unconditional offers to return. *Id.* at fn. 1 and 382. Furthermore, in that case, the employees were individually contacting the employer without any instruction from the employer. In this case, the Respondent specifically directed individuals who wished to seek employment to call the number given in the newspaper article and wait to be called with “further instructions.” They were not to walk in.

The Respondent argues that Brewer never, in specific words, made an unconditional offer to return to work. I find that by going to the plant and complaining that he had not been called, filling out the new application after pointing out that he was already employed, and answering “yes” when asked by Johnson whether he was “interested in returning,” Brewer did make an unconditional offer to return to work. His actions establish that he was unconditionally offering to return to work, and he stated no conditions detracting from that unconditional offer. The conditions were imposed by the Respondent. Those conditions, in Brewer’s case, included completion of a new application, acceptance of a wage less than he was receiving prior to the strike, assignment to whatever job management decided, and treatment of an anticipated absence upon whatever terms his supervisor decided. The Respondent, citing Brewer’s testimony, argues that he wanted the protections of a union contract before returning. Although that may well have been true *after* Johnson informed Brewer that he would be earning less, that he would be working wherever the Respondent put him, and that treatment of his anticipated absence would be at the discretion of his supervisor, Brewer, when appearing at the plant and following the instructions of the Respondent to complete a new application, placed no conditions upon his offer to return. The conditions were imposed by the Respondent. Brewer never informed the Respondent that the protections of a union contract were a condition of his return. After being informed of the conditions imposed by the Respondent, he stated that did not think “it would be in my best interest to come back to work.”

A returning striker must be reinstated to the same position or to a position substantially equivalent to the position held before the strike. Employee Brewer was offered the same starting wage as a newly hired employee which was less than he had been earning and told that his job assignment was “up to manufacturing management.” He was not offered reinstatement to the same position or to a substantially equivalent position. Thus, he was privileged to reject the offer that was made to him. By failing and refusing to reinstate employee Brewer to his former position or to a substantially equivalent position to the position that he held before the strike, the Respondent violated Section 8(a)(1) and (3) of the Act.

Both Clifton and Skinner made unconditional offers to return to work. Each followed the instructions given by the Respondent regarding the procedure they should follow by calling and not walking in. Both were placed upon the list maintained by the Respondent, but neither were afforded the rights guaranteed to strikers who unconditionally offer to return to work. Their names were placed on the list in the order that their calls were received along with the names of individuals who had never been employed by the Respondent.

Clifton informed Stanisor that he “wanted to come back to work.” The Respondent, in its response to the charge that Clifton filed with the EEOC, specifically stated that “Mr. Clifton ...
 5 did apply when Ms. Stanisor *placed his name on the list*.” Clifton did more than “apply.” He made an unconditional offer to return to work by stating that he “wanted to come back to work” without attaching any conditions. As of March 2, the date of Clifton’s conversation with Stanisor, the Respondent had hired no permanent replacements.

Skinner never talked with a human being. He called the telephone number given in the newspaper. His call was answered by a machine. He left his name and telephone number, as instructed in the newspaper article. He also called a number at the plant. His call was again answered by a machine. In that instance he left his name and telephone number and stated that he wanted a job interview. The Respondent argues that this did not constitute an offer to
 10 return. I disagree. Skinner followed the instructions given to him. Johnson admitted that an interview was a requirement for all, including former employees. Thus, the request for an interview was not inconsistent with the Respondent’s required procedures and certainly did not make his request for reinstatement conditional. His name was placed in the data base. The Respondent, in replying to employee John Clifton’s EEOC complaint, asserted that it had not
 15 discriminated against him because it had “placed his name on the list.” James Skinner’s name appears on the “Original” data base list with the notation that he is a Kohler associate. It appears on the list of February 24 with the same notation. It appears on what is designated as “Call List 3-09” with the notation “current employee,” and on what is designated as “Next Call List” with the notation “Kohler associate.”
 20

The Respondent argues that Skinner, after making the telephone calls “made no further attempt to contact Kohler.” Although he did not do so directly, he did file the charge herein. The Respondent, in its brief, observes that Skinner did not “make the simple effort to report to the plant.” The short answer to that observation is that Skinner was following the Respondent’s
 25 instructions. He did not walk in. Consistent with the instructions in the article in the newspaper, which were taken directly from the Respondent’s news release, he called the number given, left his name and number, and waited to be contacted with “further instructions.” The data base reflects that Skinner contacted the Company in the manner that it prescribed, and it identifies him as a Kohler associate and current employee. Although having made that identification, the Respondent never contacted him. Although making no further effort to contact the
 30 nonresponsive Respondent directly, Skinner filed the charge herein on May 1, in which he states that he was not recalled after making an “unconditional offer to return.” Even after Skinner filed the charge herein, the Respondent did not contact him or, consistent with its commitment in the newspaper article to provide further instructions, give him any “further instructions.” Skinner’s “name [was] on the list.” The Respondent, although now contending that Skinner “made no further attempt to contact Kohler,” did not contact him after he filed the charge and give “further instructions.” The Respondent’s answer admits that all bargaining unit employees were on strike. The failure to contact Skinner is explained only by the fact that the Respondent was treating returning strikers in the same manner as new applicants.
 35

I find that Skinner and Clifton made unconditional offers to return to work that the Respondent was obligated to act upon. Skinner contacted the Respondent on February 23. As of March 2, the date of Clifton’s conversation with Stanisor, the Respondent had hired no permanent replacements. The parties stipulated that the replacement employees did not become permanent until March 6. As explained in *Consolidated Delivery & Logistics*, 337 NLRB 524, 533 (2002):
 40
 45

In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Supreme Court held that an employer having received an unconditional offer to return to work by economic strikers

must reinstate such strikers unless the employer can demonstrate a “legitimate and substantial” business justification for refusing to do so. The hiring of temporary replacements does not excuse the employer’s refusal to reinstate economic strikers who made an unconditional offer to return to work. *Zapex Corp.*, 235 NLRB 1237, 1240 (1978).

The Respondent, by failing and refusing to reinstate Clifton and Skinner pursuant to their unconditional offers to return to work violated Section 8(a)(1) and (3) of the Act.

2. The Independent Section 8(a)(1) Allegations

The complaint, in paragraphs 14(b) and (d), alleges that the Respondent, on February 14 and March 2, informed unit employees that they would be required to complete a new application in order to return to work. The testimony of Kevin Brewer confirms that on February 14, he was required to complete a new application. On March 2, Amanda Stanisor informed Clifton that he would have to fill out an application to come back to work, “that was Company policy.” The foregoing requirement, which placed unit employees Brewer and Clifton, whom the Respondent considered to be striking employees, “on a par with someone who applies for a job off the street,” is inconsistent with their status as returning striking employees and violated Section 8(a)(1) of the Act. See *Sunol Valley Golf Club*, 310 NLRB 357,373(1993), citing *Scalera Bus Service*, 210 NLRB 63, 63-64 (1974).

The complaint, in paragraph 14(f) alleges that the Respondent, by Human Resources Manager Johnson, implied that contractual job protections and other benefits would not exist when the striking employees returned to work. The foregoing allegation is predicated upon the conversation between Brewer and Johnson in which she noted that the Respondent was working upon a new handbook and informed him that treatment of his anticipated absence would be up to his supervisor. I cannot find that the reference to working upon a new handbook implied anything. Although the testimony of Brewer suggests that Johnson’s statement that treatment of his anticipated absence would be up to his supervisor constituted a deviation from past practice, the record does not establish the past practice, thus there is insufficient evidence before me to support a finding in that regard. Although an attendance policy is contained in the Respondent’s final offer, it does not appear in the expired collective-bargaining agreement. Insofar as there was no contract, there could have been no implication relating to contractual job protections or benefits rather than past practices established by the expired contract. I shall recommend that subparagraph 14(f) be dismissed.

Conclusions of Law

1. By requiring returning striking employees to fill out applications for employment, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to reinstate striking employees upon their unconditional offers to return to work, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

5 The Respondent having unlawfully failed and refused to reinstate Kevin Brewer, John Clifton, and James Skinner upon their unconditional offers to return to work, it must offer Brewer and Skinner reinstatement and must make Brewer, Clifton, and Skinner whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from February 14, 2007, to date of proper offer of reinstatement in the case of Brewer, from March 2, 2007, to March 10, 2008, in the case of Clifton, and from February 23, 2007, to date of proper offer of reinstatement in the case of Skinner, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

15 The Respondent will also be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

20 The Respondent, Kohler, Co., Searcy, Arkansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

25 (a) Failing and refusing to reinstate striking employees represented by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America–UAW, and it Local 1000, to available positions upon their unconditional offer to return to work.

30 (b) Requiring returning striking employees to fill out applications for employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

35 2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Kevin Brewer and James Skinner full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

40 (b) Make whole Kevin Brewer, John Clifton, and James Skinner for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

45 (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to reinstate Kevin Brewer, John Clifton, and James Skinner and within 3 days thereafter notify them in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Searcy, Arkansas, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 14, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C., June 3, 2008.

George Carson II
Administrative Law Judge

⁶ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to reinstate any of you who are striking employees represented by International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW, and it Local 1000, to available positions upon your unconditional offer to return to work.

WE WILL NOT require any of you who are striking employees to fill out applications for employment as a condition of your returning to work.

WE WILL, within 14 days of the Board's Order, offer Kevin Brewer and James Skinner full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Kevin Brewer, John Clifton, and James Skinner whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to reinstate Kevin Brewer, John Clifton, and James Skinner and within 3 days thereafter notify them in writing that this has been done and that the failure to reinstate them will not be used against them in any way.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

KOHLER CO.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it

investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

The Brinkley Plaza Building, Suite 350
80 Monroe Avenue, Memphis, TN 38103-2416
(901) 544-0016, Hours: 8:00 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (901) 544–0011